

3 A BILL TO BE ENTITLED

4 AN ACT

5 relating to clarifying employee classification of independent contractors;  
6 providing pilot project for contractor registration; providing for penalties.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

8 ARTICLE 2

9 EMPLOYEE CLASSIFICATION OF INDEPENDENT CONTRACTORS

10 SECTION 1. Minnesota Statutes 2010, section 181.723, subdivision 1, is  
11 amended to read:

12 Subdivision 1. **Definitions.** The definitions in this subdivision apply to the  
13 section.

14 (a) "Person" means any individual, limited liability company, limited  
15 liability partnership, corporation, partnership, incorporated or unincorporated  
16 association, sole proprietorship, joint stock company, or any other legal or  
17 commercial entity.

18 (b) "Department" means the Department of Labor and Industry.

19 (c) "Commissioner" means the commissioner of labor and industry or a  
20 duly designated representative of the commissioner who is either an employee  
21 of the Department of Labor and Industry or person working under contract with  
22 the Department of Labor and Industry.

23 (d) "Individual" means a human being.

1 (e) "Day" means a calendar day unless otherwise provided.

2 (f) "Knowingly" means knew or could have known with the exercise of  
3 reasonable diligence.

4 (g) "Document" or "documents" includes papers; books; records;  
5 memoranda; data; contracts; drawings; graphs; charts; photographs; digital,  
6 video, and audio recordings; records; accounts; files; statements; letters; e-mails;  
7 invoices; bills; notes; and calendars maintained in any form or manner.

8 (h) "Business entity" means a person other than an individual or a sole  
9 proprietor.

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11 SECTION 2. Minnesota Statutes 2010, section 181.723, subdivision 4, is  
12 amended to read:

13 Subd. 4. **Independent contractor.** (a) An individual is an independent  
14 contractor and not an employee of the person for whom the individual is  
15 performing services in the course of the person's trade, business, profession, or  
16 occupation only if the individual is registered with the Department of Labor and  
17 Industry, if required under subdivision 4a, and the individual:

18 (1) maintains a separate business with the individual's own office,  
19 equipment, material, and other facilities;

20 (2)(i) holds or has applied for a federal employer identification  
21 number or (ii) has filed business or self-employment income tax returns with the

1 federal Internal Revenue Service if the individual has performed services in the  
2 previous year;

3 (3) is operating under contract to perform the specific services for  
4 the person for specific amounts of money and under which the individual  
5 controls the means of performing the services;

6 (4) is incurring the main expenses related to the services that the  
7 individual is performing for the person under the contract;

8 (5) is responsible for the satisfactory completion of the services that  
9 the individual has contracted to perform for the person and is liable for failure to  
10 complete the services;

11 (6) receives compensation from the person for the services  
12 performed under the contract on a commission or per-job or competitive bid  
13 basis and not on any other basis;

14 (7) may realize a profit or suffer a loss under the contract to perform  
15 services for the person;

16 (8) has continuing or recurring business liabilities or obligations; and

17 (9) the success or failure of the individual's business depends on the  
18 relationship of business receipts to expenditures.

19 (b) If an individual is an owner or partial owner of a business entity, the  
20 individual is an employee of the person for whom the individual is performing  
21 services in the course of the person's trade, business, profession, or occupation,

1 and is not an employee of the business entity in which the individual has an  
2 ownership interest, unless;

3 (1) the business entity meets the nine factors in paragraph (a);

4 (2) invoices are submitted in the name of the business entity;

5 (3) the business entity is registered with the secretary of state, if  
6 required; and

7 (4) the business entity is registered with the Department of Labor  
8 and Industry, if required under subdivision 4a.

9  
10 SECTION 3. Minnesota Statutes 2010, section 181.723, is amended by  
11 adding a subdivision to read:

12 Subd. 4a. **Registration pilot project.** (a) The commissioner shall implement  
13 a pilot project, effective July 1, 2012, for the registration of persons who perform  
14 public or private sector commercial or residential building construction or  
15 improvement services as described in subdivision 2. The purpose of the pilot  
16 project is to evaluate whether the information obtained through registration  
17 assists the Department of Labor and Industry, the Department of Employment  
18 and Economic Development, and the Department of Revenue to enforce laws  
19 related to misclassification of employees. The commissioner shall issue a report  
20 to the legislature no later than January 1, 2014, on recommendations for  
21 amendments to the registration program, including reasonable registration fees  
22 to be used to aid in enforcing misclassification laws. The commissioner must not

1 charge a fee for registration under the pilot project, but may take the  
2 enforcement action specified in subdivision 8a. The pilot project shall expire in  
3 June 30, 2014, unless extended by the legislature.

4 (b) Except as provided in paragraph (c), any person who performs  
5 construction services in the state on or after September 15, 2012, must register  
6 with the commissioner as provided in subdivision 5 before performing  
7 construction services for another person. The requirements for registration under  
8 this subdivision are not a substitute for, and do not relieve a person from  
9 complying with, any other law requiring that the person be licensed, registered,  
10 or certified.

11 (c) The registration requirements in this subdivision do not apply to:

12 (1) a person who, at the time the person is performing the  
13 construction services, holds a current license, certificate, or registration under  
14 chapter 299M or 326B;

15 (2) a person who holds a current independent contractor  
16 exemption certificate issued under this section that is in effect on September 15,  
17 2012, except that the person must register under this section no later than the  
18 date the exemption certificate expires, is revoked, or is canceled;

19 (3) a person who has given a bond to the state under section  
20 326B.197 or 326B.46;

1 (4) an employee of the person performing the construction services,  
2 if the person was in compliance with laws related to employment of the  
3 individual at the time the construction services were performed;

4 (5) an architect or professional engineer engaging in professional  
5 practice as defined in section 326.02, subdivisions 2 and 3;

6 (6) a school district or technical college governed under chapter  
7 136F;

8 (7) a person providing construction services on a volunteer basis,  
9 including but not limited to Habitat for Humanity and Builders Outreach  
10 Foundation, and their individual volunteers when engaged in activities on their  
11 behalf; or

12 (8) a person exempt from licensing under section 326B.805,  
13 subdivision 6, clause (5).

14  
15 SECTION 4. Minnesota Statutes 2011 Supplement, section 181.723,  
16 subdivision 5, is amended to read:

17 Subd. 5. **Registration application.** (a) Persons required to register under  
18 subdivision 4a must submit electronically, in the manner prescribed by the  
19 commissioner, a complete application according to paragraphs (b) to (d).

20 (b) A complete application must include all of the following information  
21 about any individual who is registering as an individual or a sole proprietor, or  
22 who owns 25 percent or more of a business entity being registered:

1 (1) the individual's full legal name and title at applicant's business;

2 (2) the individual's business address and telephone number;

3 (3) the percentage of the applicant's business owned by the  
4 individual; and

5 (4) the individual's Social Security number.

6 (c) A complete application must also include the following information:

7 (1) the applicant's legal name; assumed name filed with the  
8 secretary of state, if any; designated business address; physical address;  
9 telephone number; and e-mail address;

10 (2) the applicant's Minnesota tax identification number, if one is  
11 required or has been issued;

12 (3) the applicant's federal employer identification number, if one is  
13 required or has been issued;

14 (4) evidence of the active status of the applicant's business filings  
15 with the secretary of state, if one is required or has been issued;

16 (5) whether the applicant has any employees at the time the  
17 application is filed;

18 (6) the names of all other persons with an ownership interest in the  
19 business entity who are not identified in paragraph (b), and the percentage of  
20 the interest owned by each person, except that the names of shareholders with  
21 less than ten percent ownership in a publicly traded corporation need not be  
22 provided;

1 (7) information documenting compliance with workers'  
2 compensation and unemployment insurance laws;

3 (8) a certification that the person signing the application has:  
4 reviewed it; determined that the information provided is true and accurate; and  
5 determined that the person signing is authorized to sign and file the application  
6 as an agent of the applicant. The name of the person signing, entered on an  
7 electronic application, shall constitute a valid signature of the agent on behalf  
8 of the applicant; and

9 (9) a signed authorization for the Department of Labor and Industry  
10 to verify the information provided on or with the application.

11 (d) A registered person must notify the commissioner within 15 days after  
12 there is a change in any of the information on the application as approved. This  
13 notification must be provided electronically in the manner prescribed by the  
14 commissioner. However, if the business entity structure, legal form of the  
15 business entity, or business ownership has changed, the person must submit a  
16 new registration application and registration fee, if any, for the new business  
17 entity.

18 (e)The registered person must remain registered while providing  
19 construction services for another person. The provisions of sections 326B.091 and  
20 326B.094 to 326B.097 apply to this section.

21

1 SECTION 5. Minnesota Statutes 2010, section 181.723, is amended by  
2 adding a subdivision to read:

3 Subd. 5a. **Web site.** (a) The commissioner shall develop and maintain a  
4 Web site on which applicants for registration can submit a registration  
5 application. The Web site shall be designed to receive and process registration  
6 applications and promptly issue registration certificates electronically to  
7 successful applicants.

8 (b) The commissioner shall maintain the certificates of registration on the  
9 department's official public Web site, which shall include the following  
10 information:

11 (1) the registered person's legal business name, including any  
12 assumed name, as filed with the secretary of state;

13 (2) the person's business address designated on the application;  
14 and

15 (3) the effective date of the registration and the expiration date.  
16

17 SECTION 6. Minnesota Statutes 2010, section 181.723, subdivision 7, is  
18 amended to read:

19 Subd. 7. **Prohibited activities.** (a) The prohibited activities in this subdivision  
20 are in addition to those prohibited in sections 326B.081 to 326B.085.

21 (b) An individual shall not hold himself or herself out as an independent  
22 contractor unless the individual meets the requirements of subdivision 4.

1 (c) A person who provides construction services in the course of the  
2 person's trade, business, occupation, or profession shall not:

3 (1) require an individual through coercion, misrepresentation, or  
4 fraudulent means to adopt independent contractor status or form a business  
5 entity;

6 (2) knowingly misrepresent or misclassify an individual as an  
7 independent contractor;

8 (3) contract with or perform construction services for another person  
9 without first being registered if required by subdivision 4a;

10 (4) contract with or pay another person to perform construction  
11 services if the other person is not registered if required by subdivision 4a. All  
12 payments to an unregistered person for construction services on a single project  
13 site shall be considered a single violation. It is not a violation of this clause:

14 (i) for a person to contract with or pay an unregistered person  
15 if the unregistered person was registered at the time the contract for  
16 construction services was entered into; or

17 (ii) for a homeowner or business to contract with or pay an  
18 unregistered person if the homeowner or business is not in the trade, business,  
19 profession, or occupation of performing building construction or improvement  
20 services; or

21 (5) be penalized for violations of this subdivision that are committed  
22 by another person. This clause applies only to violations of this paragraph.

1           SECTION 7. Minnesota Statutes 2010, section 181.723, is amended by  
2 adding a subdivision to read:

3           Subd. 8a. **Enforcement; remedies; and penalties.** Notwithstanding the  
4 maximum penalty amount in section 326B.082, subdivisions 7 and 12, the  
5 maximum penalty for failure to register is \$2,000, but the commissioner shall  
6 forgive the penalty if the person registers within 30 days of the date of the  
7 penalty order.

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9           SECTION 8. Minnesota Statutes 2010, section 181.723, subdivision 10, is  
10 amended to read:

11           Subd. 10. **Notice requirements.** Unless otherwise specified, service of a  
12 document on a person under this section may be by mail, by personal service,  
13 or in accordance with any consent to service filed with the commissioner.  
14 Service by mail shall be accomplished in the manner provided in Minnesota  
15 Rules, part 1400.5550, subpart 2. Personal service shall be accomplished in the  
16 manner provided in Minnesota Rules, part 1400.5550, subpart 3. Notice of a  
17 penalty order for failure to register must include a statement that the penalty  
18 shall be forgiven if the person registers within 30 days of the date of the penalty  
19 order.

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21           SECTION 9. Minnesota Statutes 2010, section 181.723, subdivision 15, is  
22 amended to read:

1           Subd. 15. **Notice to commissioner; review by commissioner of revenue.**

2           When the commissioner has reason to believe that a person has violated  
3           subdivision 7, paragraph (b); or (c), clause (1) or (2), the commissioner must  
4           notify the commissioner of revenue and the commissioner of employment and  
5           economic development. Upon receipt of notification from the commissioner,  
6           the commissioner of revenue must review the information returns required under  
7           section 6041A of the Internal Revenue Code. The commissioner of revenue shall  
8           also review the submitted certification that is applicable to returns audited or  
9           investigated under section 289A.35.

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11           SECTION 10. Minnesota Statutes 2010, section 181.723, subdivision 16, is  
12           amended to read:

13           Subd. 16. **Data classified.** Data in applications and any required  
14           documentation submitted to the commissioner under this section are private  
15           data on individuals or nonpublic data as defined in section 13.02. Data in  
16           registration certificates issued by the commissioner are public data; except that  
17           registration information published on the department's Web site may be  
18           accessed for registration verification purposes only. Data that document a  
19           revocation or cancellation of a certificate are public data. Upon request of the  
20           Department of Revenue or the Department of Employment and Economic  
21           Development, the commissioner may release to the requesting department  
22           data classified as private or nonpublic under this subdivision or investigative

1 data that are not public under section 13.39 that relate to the issuance or denial  
2 of applications or revocations of certificates.

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4 SECTION 11. Minnesota Statutes 2010, section 289A.31, subdivision 5, is  
5 amended to read:

6 Subd. 5. **Withholding tax, withholding from payments to out-of-state**  
7 **contractors, and withholding by partnerships and small business corporations.**

8 (a) Except as provided in paragraph (b), an employer or person withholding tax  
9 under section 290.92 or 290.923, subdivision 2, who fails to pay to or deposit with  
10 the commissioner a sum or sums required by those sections to be deducted,  
11 withheld, and paid, is personally and individually liable to the state for the sum or  
12 sums, and added penalties and interest, and is not liable to another person for  
13 that payment or payments. The sum or sums deducted and withheld under  
14 section 290.92 or 290.93, subdivision 2a or 3, or 290.923, subdivision 2, must be  
15 held as a special fund in trust for the state of Minnesota.

16 (b) If the employer or person withholding tax under section 290.92 or  
17 290.923, subdivision 2, fails to deduct and withhold the tax in violation of those  
18 sections, and later the taxes against which the tax may be credited are paid,  
19 the tax required to be deducted and withheld will not be collected from the  
20 employer. This does not, however, relieve the employer from liability for any  
21 penalties and interest otherwise applicable for failure to deduct and withhold.  
22 This paragraph does not apply to an employer subject to paragraph (g).

1 (c) Liability for payment of withholding taxes includes a responsible person  
2 or entity described in the personal liability provisions of section 270C.56.

3 (d) Liability for payment of withholding taxes includes a third-party lender  
4 or surety described in section 270C.59.

5 (e) A partnership or S corporation required to withhold and remit tax  
6 under section 290.92, subdivisions 4b and 4c, is liable for payment of the tax to  
7 the commissioner, and a person having control of or responsibility for the  
8 withholding of the tax or the filing of returns due in connection with the tax is  
9 personally liable for the tax due.

10 (f) A payor of sums required to be withheld under section 290.9705,  
11 subdivision 1, is liable to the state for the amount required to be deducted, and  
12 is not liable to an out-of-state contractor for the amount of the payment.

13 (g) If an employer fails to withhold tax from the wages of an employee  
14 when required to do so under section 290.92, subdivision 2a, by reason of  
15 treating such employee as not being an employee, then the liability for tax is  
16 equal to three percent of the wages paid to the employee. The liability for tax  
17 of an employee is not affected by the assessment or collection of tax under this  
18 paragraph. The employer is not entitled to recover from the employee any tax  
19 determined under this paragraph.

20 **EFFECTIVE DATE.** This section is effective for payments made after June 30,  
21 2012.

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